89-729

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TOM ABBOTT, *et al.*,
Petitioners,

v.

THE CITY OF VIRGINIA BEACH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MICHAEL T. LEIBIG
(Counsel of Record)
JOSEPH E. SLATER
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for Tom Abbott and all other Petitioners

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QUESTION PRESENTED

Section 207(o) of the Fair Labor Standards Act, as amended, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid time and a half. Under that section, a public employer may provide compensatory time in lieu of overtime pay pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

The question presented here is whether a public employer who refused to recognize and to attempt to work out a compensatory time agreement with a representative designated by its employees may nonetheless unilaterally implement and follow a compensatory time program?

PARTIES TO THE PROCEEDING BELOW

PLAINTIFFS/APPELLANTS/PETITIONERS

1. Tom Abbott
2. Donald G. Adams
3. Frederick C. Adams, Jr.
4. Raymond J. Bach
5. Robert G. Bach
6. Douglas B. Backman
7. William D. Barnette
8. Graziamaria A. Barone
9. Salvatore A. Barone
10. Andrew A. Bell
11. John L. Bell, Jr.
12. Phillip J. Bender
13. Raymond W. Bishop, Jr.
14. Jeffrey T. Blatt
15. John M. Borman
16. Raymond K. Bousman
17. Davie E. Boyd
18. William H. Boyden
19. Joseph A. Calvert, Jr.
20. Diane L. Campbell
21. Donald J. Campbell
22. Mark E. Campbell
23. Robert L. Christian, III
24. Lucian Colley
25. Michael Collins
26. Charles J. Condon
27. Lynn D. Crisher
28. Sherrie L. Crone
29. Joseph M. Curran, Sr.
30. Donna L. Davis
31. Michael A. DeSantis
32. Brian P. Dewan
33. Michael Dodson
34. Terrence P. Dugan
35. Brian J. Eaton
36. Murray L. Eiler, Jr.
37. Anthony J. Elver
38. Michael D. Falkner
39. Howard E. Fawley, Jr.
40. N.D. Ferguson
41. Robert G. Floyd
42. Gerard A. Fockler
43. Dennis Free
44. Frank Genova
45. Patrick A. Gough
46. Arthur D. Hallingshead
47. David D. Hammer
48. Richard W. Hatfield
49. John W. Hayden
50. Thomas D. Hayden
51. David E. Hilton
52. Jeffrey N. Hoover
53. James E. Howland
54. William F. Huston
55. James Imam
56. Darrell L. Jackson
57. Bruce E. Johnson
58. James V. Johnson
59. John Kelly
60. Michael Kennedy
61. Steven Kennedy
62. Mark W. Kiefner
63. Daniel H. Knappers
64. Gary L. Knowles
65. Steven D. Kurle
66. Frank LaPorta
67. G.W. Lawrence
68. John V. Lindey, III
69. Thomas J. Loftus
70. John M. Macroce
71. J.G. Malesky
72. Robert Manzione
73. Robert W. Mathieson
74. David W. Matson
75. Thomas M. McCarthy
76. John C. McDonald
77. James M. McElligot
78. John A. McLuckie
79. Russell P. Mike
80. Kenneth A. Miller
81. William T. Moran, III
82. Mark G. Moseley

83. Tracy D. Murphy
84. William J. O'Keefe
85. Joseph M. Patterson
86. Joseph Perez
87. Michael J. Peterson
88. Ronald A. Pollizzi
89. Richard C. Provo
90. Russell S. Renner
91. William B. Robertson
92. Gradey D. Roland
93. Arthur J. Rombs
94. Michael P. Ronan
95. Bernard J. Ruby
96. Robert R. Sager, Jr.
97. Michael D. Sanderson
98. Ernest C. Seiderman
99. Jimmie R. Sherwood
100. Nicholas Sitarski
101. John K. Slayton
102. Allen Sokolik
103. J. B. Spry
104. Tony R. Steele
105. Wesley K. Stewart
106. R. F. Strange
107. Harry C. Tatum, III
108. Richard T. Talbot
109. James M. Tegler
110. Audrey A. Turner
111. Eddie Upchurch
112. James E. Walters, Jr.
113. Timothy Warford
114. Joseph P. Werle, III
115. Garth L. Wheeler
116. Richard D. Whitehurst
117. Douglas M. Williams
118. Eugene V. Wilson
119. James L. Wood
120. Grant L. Wylie
121. Paul C. Yokum
122. The Virginia Beach Policemen's Benevolent Association
123. The Virginia Beach Police Sergeants' Association

II.

DEFENDANT/APPELLEE/RESPONDENT

The City of Virginia Beach, Virginia

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No. ———

TOM ABBOTT, *et al.*,
Petitioners,

v.

THE CITY OF VIRGINIA BEACH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Tom Abbott, *et al.*, the plaintiffs in the District Court and the appellants in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Tom Abbott, et al. v. The City of Virginia Beach*, 4th Cir., No. 88-2958 (July 19, 1989).

OPINIONS BELOW

The Court of Appeals opinion is reported at 879 F.2d 132 (4th Cir. 1989) and is reproduced as Appendix A (pp. 1a-10a) in the separately bound Appendix to this *certiorari* petition (hereafter "Pet. App.").

The District Court's order denying plaintiffs' motion for summary judgment is reported at 689 F. Supp. 600 (E.D. Va. 1988) and is reproduced as Appendix B (Pet. App. 11a-19a). The District Court's final order is un-

published and is reproduced as Appendix C (Pet. App. 20a-40a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on July 19, 1989. By an order dated October 12, 1989, the Chief Justice extended the time for filing this *certiorari* petition to and including November 6, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 207(o)(1)-(2) of the Fair Labor Standards Act, 29 U.S.C. §§ 207(o)(1)-(2), is reproduced as Appendix D (Pet. App. 41a-43a).

The Secretary of Labor's regulations set out at 29 C.F.R. § 553.23, are reproduced as Appendix E (Pet. App. 43a-45a).

STATEMENT OF THE CASE

1. The Fair Labor Standards Act, as amended, provides that employers must pay their employees one and a half times the employee's normal pay for overtime. *See* FLSA § 7, 29 U.S.C. § 207. Section 207(o) permits *public employers*, under certain stated circumstances, to substitute "compensatory time"—*viz.*, paid time off—for the added overtime pay otherwise required by the Act. In the regard most pertinent here, § 207(o)(2)(A)(i) states that compensatory time may be provided pursuant to "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . . ."

The regulations adopted by the Secretary of Labor to implement FLSA § 207(o) provide, in turn, that "the representative need not be a formal or recognized bar-

gaining agent as long as the representative is designated by the employees." Pet. App. 44a. And the regulations add ". . . *Where employees have a representative*, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency." Pet. App. 44a (emphasis added).

2. The 121 police officers employed by the City of Virginia Beach, Virginia, who are the petitioners here, designated the Virginia Beach Police Benevolent Association (VBPBA) and/or the Virginia Beach Police Sergeants' Association (VBPSA) and/or Tom Abbott, Frank LaPorta, and Nick Sitarski as their representatives for the purposes of working out an FLSA § 207(o) compensatory time agreement with their employer.

Virginia Beach, however, unilaterally instituted—and has maintained and modified—an overtime policy for police officers providing for compensatory time in lieu of overtime pay even though no agreement had been reached with the police officers' duly designated representatives.

Petitioners repeatedly objected to Virginia Beach's unilateral compensatory time policy, and ultimately brought this suit in the Federal District Court for the Eastern District of Virginia challenging the legality of that policy under the FLSA after the City consistently refused to meet with their representatives.

The court below upheld the Virginia Beach program on the grounds that (1) Virginia state law prohibits public employee collective bargaining; and (2) the officers involved had an "absolute choice" as to whether to receive compensatory time or time and a half for overtime. Pet. App. 9a-10a.

REASONS FOR GRANTING THE PETITION

A Clear Conflict Exists Among the Courts of Appeals As To The Application of the Fair Labor Standards Act's Overtime Provisions to Public Employers and Public Employees

1. Congress' assertion of a Commerce Clause power to set basic labor standards—such as those set out in the Fair Labor Standards Act, as amended—in the state and local government sector as well as in the private sector has raised a contentious federalism dispute. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985). At least in part this dispute has stemmed from the concern that Congress could not—or would not—recognize and give adequate consideration to the special attributes of the state and local governments and the special character of the public employer-public employee relationship.

In a direct response to these concerns, the 1985 Congress amended the Fair Labor Standards Act insofar as that Act applies to the public sector. P.L. 99-150; 99 Stat. 790. And Congress acted only after full consultation with both public employers and public employees in a process designed to ascertain and harmonize their basic interests and needs. Indeed, Congress went so far as to mandate the issuance of regulations necessary to implement the 1985 FLSA amendments. P.L. 99-150, § 6. The Department of Labor, in turn, conducted an extensive rulemaking proceeding and solicited and carefully considered the views of the state and local governments and of public employees. *See* 52 Fed. Reg. 2012-15 (1987).

After the *Garcia* decision, many public employers and their organizations sought congressional relief from the costs of FLSA coverage, arguing that such costs would seriously injure their ability to function effectively. In

hearings held by House and Senate committees, public employees and their representatives made the contrary arguments that compliance with *Garcia* would not be excessively costly and that it was only fair for public employees to enjoy the same labor standards as virtually all private employees.

To avoid a legislative deadlock, the public-employer and public-employee groups met and proposed a bill which was the product of intense negotiations between all the affected parties and of extensive compromise. *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 FLSA amendments). The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO and the Fraternal Order of Police," 113 Cong. Rec. S14047 (Sen. Nickles); *accord* 131 Cong. Rec. H9238 (Rep. Hawkins). And, with such broad support, the 1985 FLSA Amendments were quickly passed by Congress.

Nonetheless, a deep disagreement has developed as to a critical aspect of the compromise forged in the 1985 FLSA amendments and elaborated in the regulations on those amendments: the scope of the provision requiring public employers who desire to provide compensatory time in lieu of overtime pay to reach an agreement on compensatory time with the representative designated by their employees. This disagreement concerns the interplay between the federal law setting the conditions for the provision of compensatory time and the state law setting the conditions on which public employers may enter into agreements with their employees. And the resulting litigation has led to a three-way split in the circuits.

Given the importance and sensitivity of the underlying issue—and the serious effort Congress and the Department of Labor made to resolve that issue in a balanced fashion—this Court should settle that conflict.

2. FLSA § 207(o), as we have noted, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid time and a half. Under that section, a public employer may provide compensatory time in lieu of overtime pay pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

Section 207(o) goes on to specify that

> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o).]

In the 4 years since § 207(o) became law, three courts of appeals have had occasion to interpret the provision; each court has come to a different interpretation. Put simply, there is a clear and patent conflict in the circuits with the result that the rights and duties of public employees and public employers with respect to overtime compensation now vary widely depending on the circuit in which the employment occurs.

A. The first court of appeals decision on FLSA § 207(o) was *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). In the *West Adams* case, a local government body in Colorado—asserting the right under Colorado law of a local government employer to refuse to recognize and to bargain collectively with labor organizations—had refused to enter into an FLSA § 207(o)(2)(A)(i) compensatory time agreement with the representative that had been designated by its employees pursuant to that provision.[1] Relying on § 207(a)(2)(A)(*ii*), the West Adams Fire District argued that, given this state law right, the District was free to take the position that its employees did not—indeed as a matter of state law could not—have a representative and to follow its past practices regarding compensatory time.

The Tenth Circuit rejected that argument concluding that, under the FLSA, once employees designate a representative for purposes of reaching a § 207(o)(2)(A)(i) agreement, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement with that representative. Section 207(o)(2)(A)(*ii*)'s permission to provide compensatory time pursuant to individual agreements or past practices, said the Tenth Circuit, applies *only* where the employees in question have *not* designated a representative.

In reaching its conclusion, the Tenth Circuit principally relied on the Department of Labor's regulations on § 207(o)—promulgated, as we have noted, pursuant to an explicit statutory command—which state in pertinent part:

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[1] Under Colorado law, governmental entities have a right to refuse to recognize labor organizations and to refuse to engage in collective bargaining or enter into any agreements whatsoever with such organizations. *See City and County of Denver v. Denver Fire Fighters*, 663 P.2d 1032, 1036-1039 (Colo. 1983); *Littleton Education Asso. v. Arapaho County School District No. 6*, 191 Colo. 411, 553 P.2d 793 (1976).

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency . . . . In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. § 553.23(b)(1) (quoted 877 F.2d at 817).]

The Tenth Circuit recognized that the foregoing makes two points irrefutable:

> *First*, if employees have a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. *Second*, employees are deemd to be represented under section 207(o) if they merely designate a representative; the representative need not be recognized by the employer. [877 F.2d at 818 (emphasis added).]

In determining whether to follow this administrative construction, the Tenth Circuit undertook two inquiries: (1) is the statutory language ambiguous; and (2) is the administrative construction a reasonable resolution of the ambiguity, in light of the statute's language and history. That court answered both inquiries "yes."[2]

As to the second inquiry, the Tenth Circuit—following this Court's instructions in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)—stated that "the Department's construction of the Section, if reasonable, is controlling even if there is an equally reasonable construction." 877 F.2d at 817. And, that court

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[2] As to the first issue, whether the statute is ambiguous, the court stated as follows: "We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to 'employees not covered by subclause (i).' However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative." 877 F.2d at 817; *see also id.* at n.1.

rested its conclusion that the Labor Department's construction of FLSA § 207(o) is reasonable on the relevant legislative history.

In this regard, the Tenth Circuit noted that the legislative materials clearly establish that § 207(o)(2)(A)(ii) only applies where the employees have *no* representative. *See* 877 F.2d at 819 (quoting S.Rep. No. 99-159, 99th Cong. 1st Sess. 10-11 (1985) and H.R. Rep. No. 99-331, 99th Cong. 1st Sess. 20 (1985)). And that court found that—although there were "variations in the reports of the two houses of Congress" on the issue of when employees have a representative, 877 F.2d at 820—the Labor Department's interpretation is derived from the House Report. "[B]ecause of the support of the House report," the Tenth Circuit held that the Labor Department "reasonably determined that employees are represented if they have merely designated a representative whom the employer has failed to recognized." [3]

B. The Fourth Circuit decision in the instant case—which issued shortly after the Tenth Circuit's *West Adams* decision—cannot be reconciled with that of the Tenth Circuit.

Like the Tenth Circuit, the court below concluded that the statutory language is ambiguous on the issue of when employees have a "representative" for purposes of § 207(o)(2)(A)(i)—and hence on when an employer who desires to provide compensatory time may only do so pursuant to an agreement with such a representa-

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[3] We hasten to add that nothing in the Tenth Circuit's analysis requires a public employer to recognize—or to reach any agreement with—any employee representative or with any individual employee if doing so is contrary to state law or state policy. All that the Tenth Circuit held—and all that petitioners argue here—is that in such circumstance the public employer, having for its own sufficient reason chosen not to take advantage of the option provided by Congress, is required to pay time and a half for overtime (just as a private employer covered by the FLSA is required to do).

tive—and that the "legislative history is contradictory on the issue." Pet. App. 6a. But the Fourth Circuit, unlike the Tenth, concluded that "the administrative commentary is confusing" as well. *Id.*

Against that background, the Fourth Circuit focused on two factors in construing § 207(o), neither of which is adverted to in the statute or in the Labor Department's regulations: first, that Virginia state law does not permit public employee collective bargaining, and, second, that the public employer here had allowed each employee required to overtime an absolute choice between overtime pay and compensatory time (albeit without reaching a § 207(o)(2)(A)(i) agreement with the representative the affected employees had designated pursuant to that provision).

Regarding the relevance of the state-law status of collective bargaining, the Fourth Circuit quoted language in the preamble of the Labor Department's regulations stating:

> The Department recognized that there is a wide variety of State law that may be pertinent . . . . It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices. [Pet. App. 8a quoting 52 Fed. Reg. 2012, 2014-15 (1987).]

On the basis of the foregoing, the court below concluded that § 207(o)(2)(A)(i) does not apply where state law prohibits collective bargaining, since otherwise the statute would "preempt," rather than incorporate state law. *See* Pet. App. 8a.[4]

The Fourth Circuit distinguished the Tenth Circuit's *West Adams* decision on the ground that Virginia law

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[4] As we develop at pp. 13-15, *infra*, the Fourth Circuit did not cite or discuss other portions of the preamble or the portions of the regulations itself which belie that court's reading of the regulation.

prohibits public employment collective bargaining agreements while Colorado law allows local governments to choose whether to engage in or to refuse to engage in collective bargaining. Pet. App. 9a n.4. The court below did not explain, however, why a state decision to prohibit collective bargaining should operate to alter the scope of § 207(o)(2)(A)(i), while a state decision to delegate that decision to a local government, which in turn determines to deny its employees collective bargaining rights, should not.

Regarding the fact that Virginia Beach offered individual employees a choice of overtime pay or compensatory time, the Fourth Circuit stated that respondent had conformed to the underlying policies of FLSA § 207(o) which "provide flexibility to state and local government employers and an element of a choice to their employees regarding compensation for statutory overtime hours worked by covered employees." 879 F.2d at 136-137 (quoting H.R. Rep. No. 99-331, *supra*). However, that court did not explain how this factor fits into § 207(o)'s language or structure.

C. The Eleventh Circuit's decision in *Dillard v. Harris*, 885 F.2d 1549 (forthcoming); slip op. No. 88-8245 (11th Cir. September 29, 1989), *petition for rehearing pending*, is the most recent to deal with FLSA § 207(o). The *Dillard* case involved Georgia state employees who had designated a labor organization as their § 207(o) representative and a state employer who had refused to recognize the designation and had, instead, continued a unilateral past practice of providing compensatory time in lieu of overtime pay. The Eleventh Circuit held that § 207(o)(2)(A)(*ii*)—rather than § 207(o)(2)(A)(*i*)—governed and that Georgia was free to provide compensatory time pursuant to its past practice.

Th Eleventh Circuit noted that Georgia, like Virginia, does not provide for public employee collective bargain-

ing, and, on that basis, stated that it would follow the Fourth Circuit's decision in the instant case. In so doing, the Eleventh Circuit readily acknowledged that there is a conflict between the Fourth and Tenth Circuits, and that in following the Fourth, the Eleventh was "refus[ing] to follow the Tenth Circuit [in *West Adams*] which reached a different result." 885 F.2d at ——; slip op. at 3.

The Eleventh Circuit, moreover, stated that "[b]ecause this issue is surfacing in various courts which are reaching divergent results, . . . a discussion of an alternative approach that reaches the same result may be appropriate." 885 F.2d at ——; slip op. at 3. That court then justified its decision on an alternative basis which, in its view, is "[e]qually satisfactory" to the approach of the Fourth Circuit, *id* at ——; slip op. at 3, and which is at least equally in conflict with the approach of the Tenth Circuit. Indeed, the Eleventh Circuit's elaboration of its alternative basis of decision largely amounts to a point-by-point disagreement with the Tenth Circuit's *West Adams* decision.

The Eleventh Circuit reasoned that—despite the contrary view of the Tenth Circuit (and, as we read the opinion below in the instant case, of the Fourth Circuit) —the relevant statutory language is clear and unambiguous. On the Eleventh Circuit's reading, § 207(o)(2)(A)(*i*) applies only where an agreement exists between an employer and a representative; all other situations are governed by § 207(o)(2)(A)(*ii*), whether or not the employees have designated a representative. 885 F.2d at ——; slip op. at 9-11. Although, as the Tenth Circuit recognized, this construction of § 207(o) is in conflict with *both* the House and Senate reports, *see West Adams*, *supra*, 877 F.2d at 819 (quoting House and Senate reports), the Eleventh Circuit held that the legislative history contains only "unclear and conflicting statements"

on the issue. 885 F.2d at ——; slip op. at 13.[5] Moreover, the *Dillard* opinion *wholly ignored* the Labor Department's regulations which state the position followed by the Tenth Circuit and opposite to the position of the Eleventh Circuit. *See* 29 C.F.R. § 553.23(b)(i) ("Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency.") (*quoting in West Adams, supra*, 877 F.2d at 817). Finally the Eleventh Circuit expressly refused to adopt the Fourth Circuit's position that the fact that a public employer provides an "absolute choice" between overtime pay and compensatory time is relevant in determining the scope of § 207(o)(2)(A)(i). Thus, the *Dillard* decision states yet a third construction of § 207(o), and this construction is in conflict with both the prior § 207(o) decisions.

As the foregoing makes clear, the decisions of the Tenth, Fourth and Eleventh circuits on the meaning of § 207(o) leave the law in total disarray. Review by this Court is urgently required.

3. The Fourth Circuit's decision below is not only in conflict with both the Tenth and Eleventh Circuit decisions regarding the meaning of § 207(o), as we will now show, it is also incorrect. While paying lip service to principles of deference to agency resolution of open statutory questions, the Fourth Circuit's view of the statute conflicts with the reasonable view adopted by the Labor Department in its regulations.

A. According to the Fourth Circuit, § 207(o)(2)(a)(i) only applies "where state law permits employees of state and local governmental entities to have recognized

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[5] In surveying the legislative history on this point, the *Dillard* opinion failed to mention the language from the House and Senate reports that the Tenth Circuit had relied on much less do business with that language. *Compare West Adams, supra*, 877 F.2d at 819 with *Dillard, supra*, 885 F.2d at ——; slip op. at 11-15.

representatives" for purposes of collective bargaining. Pet. App. 8a. Thus, because Virginia law does not permit enforceable collective bargaining agreements, Pet. App. 4a (*citing Commonwealth v. County Bd. of Arlington County*, 217 Va. 558, 232 S.E. 2d 30 (1977)), the court below held that Virginia Beach could provide compensatory time in lieu of overtime without reaching a § 207(o)(2)(A)(i) agreement with the representative designated by its employees pursuant to that provision.

Although purporting to defer to the Department of Labor in reaching this conclusion—*see* Pet. App. 8a (quoting the regulation's preamble statement that "the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with state or local law and practices")—the Fourth Circuit entirely ignored that the Labor Department had made entirely clear in the *same preamble* that "[t]he representative of the employees *need not be a formal or recognized collective bargaining agent. . . . [C]ollective bargaining is not a necessary condition* for establishing an agreement between an employer and an employee representative," Pet. App. 48a; emphasis added.

Moreover—and again the Fourth Circuit simply ignored the relevant statutory and regulatory materials—the statute's language makes clear that less formal or binding arrangements than collective bargaining agreements are fully sufficient for § 207(o)(2)(A)(i) purposes. The provision may be complied with through "memorandum[s] of understanding or any other agreement." And, in explicit recognition of this, the Labor Department regulations state that

> [T]he agreement or understanding . . . [may be] through a memorandum of understanding or other type of oral or written agreement . . . [and] the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [Pet. App. 44a.]

Given what the Labor Department's regulations say when read in full, the Fourth Circuit's insistence that § 207(o)(2)(A)(i) has no application where the state does not permit collective bargaining is simply incorrect.

B. The Fourth Circuit's insistence that § 207(o)(2)(A)(i) has no application here because Virginia Beach provided each employee with an absolute choice between overtime pay and compensatory time is even further from the statutory scheme. The court below gave no citation of statutory or administrative authority for the proposition that this factor is even relevant much less dispositive. Again, the court below was simply in error.

CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MICHAEL T. LEIBIG
(Counsel of Record)
JOSEPH E. SLATER
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for Tom Abbott and all other Petitioners

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TOM ABBOTT, *et al.*,
Petitioners,

v.

THE CITY OF VIRGINIA BEACH,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MICHAEL T. LEIBIG
(Counsel of Record)
JOSEPH E. SLATER
ZWERDLING, PAUL, LEIBIG, KAHN,
THOMPSON, & DRIESEN, P.C.
1025 Connecticut Avenue, N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

LAURENCE GOLD
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for Tom Abbott and all other Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2958

TOM ABBOTT, individually, as President of the Virginia Beach Policemen's Benevolent Association, and as FLSA Representative of Plaintiffs, et al.
Plaintiff-Appellant,

v.

THE CITY OF VIRGINIA BEACH
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (CA-87-885-N)

Argued: May 11, 1989 Decided: July 19, 1989

Before WILKINS, Circuit Judge, HAYNSWORTH, Senior Circuit Judge, and TURK, Chief United States District Judge for the Western District of Virginia, sitting by designation.

Michael Tarcissius Leibig (Joseph E. Slater, ZWERDLING, PAUL, LEIBIG, KAHN & THOMPSON, P.C.;

Kenneth W. Stolle on brief) for Appellant. Randall Mahlon Blow, Assistant City Attorney (J. Dale Bimson, City Attorney on brief) for Appellee.

WILKINS, Circuit Judge:

The Virginia Beach Policemen's Benevolent Association, its current and past presidents, the Virginia Beach Police Sergeants Association, its current president, and 126 individual Virginia Beach policemen (collectively, the Policemen) appeal from the grant of partial summary judgment in favor of the City of Virginia Beach on their claims for violation of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C.A. §§ 201, *et seq.* (West 1978 & Supp. 1989). We affirm.

I.

From April 1, 1986 through January 21, 1988, the Virginia Beach Police Department (the Department) provided compensation to its officers for overtime at a rate of one and one-half times their regular pay rate as required by the FLSA, 29 U.S.C.A. § 207(a)(2). Pursuant to Department policy, each officer had the choice of receiving his overtime compensation in money or compensatory leave, or any combination thereof.[1] Thus, if an employee worked four hours overtime one day, he could elect to receive four hours overtime pay or four hours compensatory leave or any combination he chose. If the employee worked four hours overtime the next day, he could again make any election he chose. The officer exercised his option after each occasion of working overtime by submitting an Overtime and Leave Request form.

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[1] As of January 21, 1988, the Department changed its policy to compensate all overtime in money. The Policemen do not challenge the current policy.

On each occasion the employee's choice would be automatically honored by the Department.

The Policemen instituted this action claiming that the previous policy violated the FLSA, 29 U.S.C.A. § 207(o), because the Department refused to negotiate an agreement with their designated FLSA representatives[2] and promulgated the policy unilaterally. They sought a monetary award in exchange for their accrued compensatory leave and an equal amount as liquidated damages for alleged willful violation of the Act.[3] The district court granted partial summary judgment to the City holding that the policy complied with the FLSA. *Abbott v. City of Virginia Beach*, 689 F. Supp. 600 (E.D.Va. 1988).

II.

As originally enacted, the FLSA was not applicable to state or local public employers. Congress later attempted to subject almost all state and local public agencies to the overtime and minimum wage requirements of the FLSA. However, the Supreme Court held that the requirements could not be enforced against public employers where traditional government functions were involved. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976). In 1985 the Court overruled *Usery*, holding that Congress was not limited by the nature of the work in requiring public employers to comply with the FLSA. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985).

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[2] Tom Abbott, president of the Benevolent Association, Nicholas Sitarski, president of the Sergeants Association, and Frank LaPorta, past president of the Benevolent Association, were designated as alternate FLSA representatives by 253 individual Virginia Beach policemen.

[3] At oral argument, counsel for the Policemen indicated that if the court remanded the case, they would also seek a monetary award for compensatory leave which had already been utilized.

After *Garcia* was decided, Congress amended the FLSA to enable public agencies to implement compensatory leave policies in lieu of monetary payments for overtime. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(a), 99 Stat. 787 (1985) (added 29 U.S.C.A. § 207(o)). The amendment provides:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> > (A) pursuant to—
> >
> > (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
> >
> > (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .

29 U.S.C.A. § 207(o).

Virginia law prohibits the Department from collectively bargaining with representatives of its employees. *Commonwealth v. County Bd. of Arlington County*, 217 Va. 558, 232 S.E.2d 30 (1977). Consequently the Policemen do not have a collective bargaining agreement with the Department. Nevertheless, the Policemen chal-

lenged the Department policy on the ground that the Department did not reach an agreement with their designated employee representatives prior to promulgating the policy. The district court held that a subclause (i) agreement is "only required where state law permits state and local governmental entities to recognize representatives of their employees for collective bargaining purposes." 689 F. Supp. at 603. The court concluded that the Department policy complied with section 207(o) since Virginia law prohibited the Department from entering into an agreement with its employees collectively. *Id.* at 604.

The Policemen contend that the district court erred in interpreting the term "representatives" to mean only recognized bargaining agents. They assert that any designee of the employees is a representative, whether recognized or not, and that if public employees designate a representative, compensatory leave cannot be provided in lieu of cash for overtime unless an agreement is reached with the representative. They further assert that if a designation is made and the employer refuses to deal with the representative, the employer cannot reach individual agreements with the employees who made the designation—it must provide cash payment. According to the Policemen, the employee representative acts for only those officers who designate him and only for as long as they choose. In the Policemen's view, the Department may enter into individual agreements with the officers who do not designate a representative and any officer may withdraw his designation and contract individually with the Department at any time. Thus, the Policemen take the position that in order to utilize compensatory leave, the Department should be required to reach an agreement with a designated representative and be bound by the agreement while an officer who designated a representative could unilaterally opt out of the agreement if he became dissatisfied.

III.

The question here is whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory leave in lieu of money for overtime where state law prohibits the employer from entering into agreements with employee representatives. In construing section 207(o), the principal function of the court is to effectuate congressional intent. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). This is a difficult task since the statute does not define the term "representatives," legislative history is contradictory, and administrative commentary is confusing. However, after considering all pertinent factors, we conclude that the district court properly interpreted the statute as allowing public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives.

A.

The first step in construing legislative intent is to examine the statutory language. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). However, since section 207 does not define "representatives," consideration must be given to "the authoritative source" for determining legislative intent—"the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). Also, the regulations promulgated by the Department of Labor are entitled to respect. *See Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981).

Here, although the language of both the House and Senate bills tracks the language of subclause (i) ver-

batim, different views of its meaning are expressed. In explaining the provision, the House Report provides: "Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer. . . ." H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985). In contrast, the Senate Report states: "Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee." S. Rep. No. 159, 99th Cong., 1st Sess. 10 (1985). The Conference Report did not address this issue. H.R. Rep. No. 357, 99th Cong., 1st Sess. (1985).

The Secretary of Labor, pursuant to the mandate of Congress, promulgated regulations implementing the statute. 29 C.F.R. Part 553 (1988). These regulations provide, in pertinent part: "In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." 29 C.F.R. § 553.23(b)(1). The Discussion of Major Comments accompanying promulgation of the final regulations indicates that the issue now before the court was considered by the Secretary. Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012 (1987).

Commentators had expressed concern that section 553.23(b)(1) would conflict with state laws, such as in Virginia, which do not require, or actually prohibit, recognition of collective bargaining agents. *Id.* at 2014. In response to this concern, the Secretary stated:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a [collective bargaining agreement], memorandum of understanding or other agreement be reached be-

> tween the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.

Id. at 2014-15. Thus, while the Secretary followed the House position that an agreement must be reached between an employer and a representative of the employees where a representative has been designated—whether recognized or not—he also expressed intent not to preempt state law.

The Policemen also presented a letter from the congressional sponsors of the bill to the Secretary of Labor after passage of section 207(o). The congressional members indicated support for the Secretary's section 553.23(b) of the regulations, as "properly reflect[ing] the language and the intent of the new law." However, these *post hoc* statements are entitled to little weight, *see Weinberger v. Rossi*, 456 U.S. 25, 35 (1982), particularly since the Secretary's regulation adopts the House position without resolving the conflict between the express intent of both chambers of Congress.

B.

The district court relied upon the Senate Report in concluding that Congress intended subclause (i) to apply only where state law permits employees of state and local governmental entities to have recognized representatives. 689 F. Supp. at 602. The court did not consider the House Report and rejected the Secretary's regulation as contrary to the Senate Report. *Id.* at 603. While the district court should have considered the House Report

as well as the Senate Report, it reached the proper conclusion in any event. The district court also properly declined to follow the holdings of other courts which adhered to the regulation, for those cases are distinguishable in several key aspects. *Dillard v. Harris*, 695 F. Supp. 565 (N.D.Ga. 1987); *Jacksonville Professional Fire Fighters Ass'n Local 1296 v. Jacksonville*, 685 F. Supp. 513 (E.D.N.C. 1987). *See also Int'l Ass'n of Fire Fighters Local 2203 v. West Adams County Fire Protection Dist.*, No. 87-F-16 (D. Colo. Mar. 18, 1988), *aff'd*, —— F.2d ——, No. 88-1691 (10th Cir. June 9, 1989); *Bleakly v. City of Aurora*, 679 F. Supp. 1008 (D. Colo. 1988); *Wilson v. City of Charlotte*, No. C-C-88-79-P (W.D.N.C. Nov. 20, 1988). Most importantly, they did not involve a situation where, as here, a public employer, who was prohibited by state law from contracting with employee representatives, gave each employee an absolute choice of whether to accept compensatory leave in lieu of money.[4]

Beneath the conflicting and confusing rhetoric of the administrative and legislative history, several matters are clear. The Secretary expressly declined to preempt state laws regarding labor relations between public employers and employees. And, the House Report stated that the purpose of section 207(o) was "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees." H.R. Rep. No. 331, 99th Cong., 1st Sess. 19 (1985).

The Department policy fulfilled the central purposes of section 207(o). The policy allowed the Department some flexibility in dealing with overtime compensation and pro-

---

[4] In the Colorado cases, there were no assertions by the public employers that they were prohibited by state law from contracting with the employee representatives. And, in the North Carolina and Georgia cases, the employer retained the sole discretion on whether to provide compensatory leave or money for overtime.

vided the individual Policemen not only an "element of choice," but an *absolute* choice in electing compensatory leave, money, or any combination thereof each time they worked overtime.

In the final analysis, the district court holding that public employers may enter into these types of individual agreements with its employees where state law prohibits agreements with employee representatives sustains state law and under the circumstances here, effectuates fairness, flexibility and choice.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 87-885-N

TOM ABBOTT, *et al.*,
Plaintiffs,

v.

THE CITY OF VIRGINIA BEACH,
Defendant.

ORDER

This action was brought for alleged violations of the amended Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Plaintiffs are the Virginia Beach Policemen's Benevolent Association ("VBPBA"); the Virginia Beach Police Sergeant's Association ("VBPSA"); Tom Abbott and Frank LaPorta, the current and past presidents of VBPBA, and Nicholas Sitarski, the current president of VBPSA, in their individual and organizational capacities and in their capacities as "FLSA Representatives"; and one hundred twenty-six other individual Virginia Beach police officers. The sole defendant is the City of Virginia Beach (the "City"). Plaintiffs seek, among other things, declaratory relief under 28 U.S.C. § 2201 and compensatory and liquidated damages under 28 U.S.C. § 216(b).

On June 3, 1988, plaintiffs moved this Court for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). On June 7, 1988, the City moved for partial summary judgment pursuant to Rule 56(b) on the issue of whether its practices violated 29 U.S.C. § 207(o)(2)(A). On June 13, 1988, plaintiffs submitted a reply

brief in which they state that all of the City's alleged FLSA violations had been corrected with the exception of its alleged violation of Section 207(o)(2)(A). Accordingly, this issue is ripe for disposition.

The facts material to resolving this issue are not in dispute. The individual plaintiffs are employees of the City. The City is a municipal corporation organized and operating under Virginia law and a public agency within the meaning of Section 207(o)(1). The Virginia Beach Police Department (the "Police Department") is the law-enforcement agency of the City. Collectively, Abbott, LaPorta and Sitarski (both individually and through the VBPBA and VBPSA) are the designated "FLSA Representatives" for 253 of the between 400 and 500 officers in the Police Department. Some of the 253 police officers are also individual plaintiffs.

On April 1, 1986, the City, through the Police Department, instituted a policy concerning officer overtime pay which continued until January 21, 1988. As required by 29 U.S.C. § 207(a)(2), an officer was paid for any time worked over forty hours a week at a rate one and a half times his regular pay rate. Each time an officer worked overtime, he was given the choice of whether to take his vacation pay in compensatory time or money. He indicated his choice by completing a "Form P.D. 130-2" and submitting it to his immediate supervisors at the end of his shift. The City's policy was to honor an officer's choice, and there is no evidence that a Form P.D. 130-2 request was ever denied.

The City adopted this policy of its own accord instead of by agreement with Abbott, LaPorta and Sitarski. No meetings were held between the City and these plaintiffs, although the City did offer to meet with them to discuss their individual problems and concerns.

On January 21, 1988, the City, through the Police Department, promulgated its present policy of paying all overtime in money.

Section 207(o) provides in part:

> (1) Employees of a public agency which is a State, a political subidivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hour for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .

29 U.S.C. § 207(o) (1985 Supp. III). The parties agree that the City's policy since January 21, 1988 is in compliance with Section 207(o)(2)(A). They disagree, though, over whether the City's policy from April 1, 1986 to January 21, 1988 complied with Section 207(o)(2)(A). Plaintiffs contend that since 253 Virginia Beach police officers were represented by Abbott, LaPorta and Sitarski, Section 207(o)(2)(A)(i) required that the City enter into an agreement with these plaintiffs rather than each of the 253 officers individually concerning the use of compensatory time as pay for overtime. The City takes the position that because Virginia law prohibits

it from collectively bargaining with representatives of its employees, *see Commonwealth* v. *County Board of Arlington County*, 217 Va. 558, 232 S.E.2d 30 (1977), it was required to comply with Section 207(o)(2)(A)(ii), which it did by implementing a policy of allowing police officers to individually choose to take overtime pay in compensatory time or money.

The issue comes down to whether Abbott, LaPorta and Sitarski needed to be "recognized" representatives in order to make a Section 207(o)(2)(A)(i) agreement. "Recognition", as that term is understood in the context of the National Labor Relations Act, the Taft-Hartley amendments and labor law in general, means the acknowledgment by an employer that a collective-bargaining representative has been designated by a majority of employees in the appropriate bargaining unit and thus that the employer is obligated to bargain exclusively with the representative. *See, e.g., N.L.R.B.* v. *Ralph Printing & Lithographing Co.*, 379 F.2d 687, 692-693 (8th Cir. 1967); *N.L.R.B.* v. *Clinton E. Hobbs Co.*, 132 F.2d 249, 251 (11th Cir. 1942).

Section 207(o)(2)(A)(i)'s use of the term "representatives" is sufficiently ambiguous that resort to the legislative history of the Section is required. *Cf. Int'l Ass'n of Fire Fighters* v. *West Adams County Fire Protection District*, Civil Action No. 87-F-16 at 5, fn. 2 (D. Colo. March 18, 1988). The legislative history makes clear that Congress intended Section 207(o)(2)(A)(i) to apply only where state law permits employees of state and local government entities to have recognized representatives. In its report on the 1985 FLSA amendments that created Section 207(o), the Senate Committee on Labor and Human Resources stated in regard to Section 207(o)(2)(A):

> Where employees have a recognized representative, the agreement, or understanding must be between

> that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee.

S. Rep. No. 99-159, 99th Cong., 1st Sess. 10, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 658.

Plaintiffs rely on two cases that, to the contrary, hold that Section 207(o)(2)(A)(i) applies to any employee or group of employees who designates a representative to negotiate with the state or local governmental employer concerning the form in which overtime will be compensated, whether or not that representative is recognized. *See Jacksonville Professional Fire Fighters Ass'n* v. *Jacksonville*, 685 F. Supp. 513 (E.D.N.C. 1987); *Dillard* v. *Harris*, No. C86-834A (N.D.Ga. Sept. 30, 1987). The Court does not find these cases persuasive. These cases fail to address the Senate Committee report and instead look to two sources outside of the legislative history in reaching their holdings. The first is the Department of Labor's interpretation of Section 207(o)(2)(A) found at 29 C.F.R. § 553.22. That regulation reads in part:

> In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

24 C.F.R. § 553.22(b)(1) (1987). The second source is a 1986 letter from several Congressmen who had sponsored the 1985 FLSA amendments to then Secretary of Labor Brock, expressing their approval of the Department of Labor's interpretation:

> We were careful in developing the amendment to be clear that the representative need not be a formally

> recognized collective bargaining representative and that recognition by the employer was not required.
>
> • • • •
>
> It is the employees' designation, and not the employer's recognition or attitude toward that representative that is vital. FLSA Section 7(o)(2)(A)(i) was specifically drafted to avoid any requirements of formal recognition.

Letter from Congressional Sponsors of the Fair Labor Standards Amendments of 1985 to Secretary of Labor William E. Brock at 2 (Sept. 26, 1986). If the Senate Committee report did not address Congress' intent concerning Section 207(o)(2)(A), these two sources would have interpretive value. However, the Senate Committee report speaks clearly and to the contrary of these sources. As legislative history, the Senate Committee's interpretation of Section 207(o)(2)(A) must prevail over the Department of Labor's interpretation and a post-enactment attempt by several Congressmen to place their own gloss on the statute.

The Court need not pause long over the fact that Section 207(o)(2)(A)(i) provides that an agreement under that subsection can be reached by means of a "memorandum of understanding or any other agreement" as well as by means of a collective bargaining agreement. Here again, the Senate Committee report is helpful. Concerning the form that a Section 207(o)(2)(A)(i) agreement is to take, the report states that "[t]he agreement or understanding need not be in writing, but a record of its existence must be kept." Senate Committee Report at 10, 1985 U.S. Code Cong. & Admin. News at 658. This statement indicates that Congress intended by this language to avoid restricting the form in which Section 207(o)(2)(A)(i) agreements were made rather than to describe the type of representative that was permitted to enter into such agreements. Thus, based on the legisla-

tive history of Section 207(o)(2)(A), the Court holds that a Section 207(o)(2)(A)(i) agreement is only required where state law permits state and local governmental entities to recognize representatives of their employees for collective bargaining purposes.

Plaintiffs also argue that Virginia law permits the City to reach a Section 207(o)(2)(A)(i) agreement with Abbott, LaPorta and Sitarski. While plaintiffs concede that municipalities in Virginia are prohibited from collectively bargaining with their employees, they assert that Virginia law allows Abbott, LaPorta and Sitarski to represent the 253 police officers to the extent necessary to make a Section 207(o)(2)(A)(i) agreement. This argument fails for two reasons. First, as discussed above, Congress intended Section 207(o)(2)(A)(i) to apply only where a state or local government entity is permitted to enter into a collective bargaining agreement with recognized representatives of its employees. Plaintiffs admit that such is not the case in Virginia. Second, even if Section 207(o)(2)(A)(i) could be read to permit an agreement in states that would allow "recognition" for purposes of that subsection but not for collective bargaining purposes, Virginia law would appear to prohibit such recognition by the City. Plaintiffs rely for their argument on *O'Brien* v. *Leidinger*, 452 F. Supp. 720 (E.D. Va. 1978). Yet *O'Brien* merely holds that Virginia law permits municipalities to "legally enter into 'discussions' concerning wages, hours and working conditions with representatives of public employee organizations." *Id.* at 723 (footnote omitted). Section 207(o)(2)(A)(i) mandates more than just discussions: it plainly requires that an agreement be struck between the state or local governmental entity and representatives of its employees.

As mentioned above, *Commonwealth* v. *County Board of Arlington County*, 217 Va. 558, 232 S.E.2d 30 (1977), the seminal Virginia case on collective bargaining by employees of municipalities, held that local governing bodies

cannot enter into collective bargaining agreements with exclusive bargaining agents of their employees concerning terms and conditions of employment. In reaching this conclusion, the Virginia Supreme Court relied on the Dillon Rule of strict construction of local government powers to find that since the Virginia legislature had not expressly or by necessary implication granted local governing bodies the power to enter into collective bargaining agreements with representatives of their employees, local governing bodies had no such power. *Id.* at 42-44.

The Virginia legislature has not expressly or impliedly granted the City, either by statute or by the City's charter, the power to enter into any type of agreement with representatives of its employees concerning compensation. Therefore, the Court is of the opinion that if faced with the present issue, the Virginia Supreme Court would hold that a municipality such as the City is prohibited from "recognizing" a representative of its employees even for the limited purposes of reaching a Section 207(o)(2)(A)(i) agreement.

Plaintiffs do not argue that the City's policy from April 1, 1986 to January 21, 1988 did not comport with Section 207(o)(2)(A)(ii)'s requirement that "an agreement or understanding [be] arrived at between the employer and employee before the performance of work . . ." nor does it appear that the City's policy of giving each individual police officer the choice as to how he would be compensated for a specific overtime period violated this provision. Accordingly, the Court holds that the City's policy from April 1, 1986 to January 21, 1988 was in compliance with Section 207(o)(2)(A).

For the foregoing reasons, the City's Motion for Partial Summary Judgment is GRANTED, and plaintiffs' Motion for Summary Judgment is DENIED as to the issue of whether the City violated Section 207(o)(2)(A).

Counsel are DIRECTED to advise the Court within ten (10) days whether there are claims left unresolved after this opinion and if so whether they wish to pursue them.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

/s/ J. Cavitt Clarke
United States District Judge

Norfolk, Virginia

July 22, 1988

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 87-885-N

TOM ABBOTT, *et al.*
Plaintiffs,

v.

THE CITY OF VIRGINIA BEACH
Defendant.

ORDER

Upon the motion of both parties, and pursuant to the submission of the parties and the Court's earlier Order of July 22, 1988, it is hereby

ORDERED that—

(1) Plaintiffs' claims supported by Complaint paragraphs 6 through 8, 11 through 13, 16 through 18, 21, 28 through 31, and 33, with regard to whether defendant violated Section 207(o)(2)(A) by establishing a system of compensatory time in lieu of cash overtime are dismissed in favor of defendant pursuant to the Court's July 22, 1988 Grant of Partial Summary Judgement; and

(2) all other claims of plaintiff are dismissed with prejudice under Federal Rules of Civil Procedures 41(a), on the basis of the parties' settlement agreement attached hereto.

ENTERED:

Oct. 25, 1988

/s/ J. Cavitt Clarke
United States District Judge

WE MAKE SO:

/s/ Michael T. Leibig
MICHAEL T. LEIBIG
Attorney for Plaintiffs

ZWERDLING, PAUL, LEIBIG,
KAHN & THOMPSON, P.C.
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 857-5000

/s/ Kenneth W. Stolle
KENNETH W. STOLLE
2687 International Parkway
Suite Parkway Two
Virginia Beach, VA 23452

SEEN AND AGREED TO:

/s/ Randall Blow
RANDALL BLOW, Esquire
Assistant City Attorney
Municipal Center
Virginia Beach, VA 23456

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 87-885-N

TOM ABBOTT, *et al.*
Plaintiffs,

v.

THE CITY OF VIRGINIA BEACH
Defendant.

SETTLEMENT AGREEMENT

This agreement constitutes a final and complete settlement of all issues raised by the above-captioned case beyond the 29 U.S.C. Section 207(o)(2)(A) issue which was subject to Partial Summary Judgment on July 22, 1988. Plaintiffs preserve their right to appeal the Partial Summary Judgment Order.

I. *Dismissal With Prejudice.*

The parties will file a joint request for dismissal with prejudice under Rule 41(a) of the Federal Rules of Civil Procedure incorporating by reference the following settlement. The total monetary cost of the settlement is to be paid by defendant in complete discharge of all claims not covered by the July 22, 1988 Order.

II. *Future Relief.*

A. *Exemption of Sergeants.* Defendant agrees to treat police sergeants as non-exempt under the FLSA.

B. *Compensatory Time.* Defendant has adopted an overtime policy which provides for the award of compensatory time. This policy has an effective date of November 1, 1988.

C. *Work Time and Regular Rate.* Defendant agrees to comply fully with all work time and regular rate provisions of the Fair Labor Standards Act, 29 U.S.C. Section 201, *et seq.*, including all Department of Labor regulations on work time and calculation of the regular rate.

III. *Back Pay Monetary Settlement.*

A. *Back Pay.* In accordance with 29 U.S.C. Section 216(b), plaintiffs will be paid $12,413.62 as liquidated damages arising out of earlier inincentive pay adjustments as outlined in Attachment A.

B. *Compensatory Time Accrued By Sergeants.* All plaintiffs who served as sergeants between April 16, 1986 and January 21, 1988, will be credited with additional hours of compensatory time too as set forth in Attachment B.

C. *Attorneys Fees and Costs.* Defendants shall pay plaintiffs' reasonable attorneys fees and costs to Zwerdling, Paul, Leibig, Kahn & Thompson, P.C. in the amount of $18,415. These fees constitute approximately 50% of the total costs and fees incurred by plaintiffs through July 31, 1988. The parties agree that the attorney's fees and costs settlement reflects only plaintiffs' reasonable fees and costs relating to issues raised by the case other than the compensatory time issue which is the subject of the Court's July 22, 1988 Order granting Defendants' Partial Summary Judgment on the compensatory time issue. Plaintiffs retain their right to seek the remainder of the fees and costs in the event that they are ultimately successful, after appeal, on the compensatory time issue.

D. *No Other Payments.* These payments total $30,828.62. They will be made no later than October 31, 1988. No additional payments will be made of any kind. These payments constitute a complete settlement of all claims under the FLSA and this case other than those which may arise out of any successful appeal of the Court's July 22, 1988 Order. No liquidation or interest beyond these figures will be paid.

IV. *Complete and Final Settlement.* This agreement is a complete and final settlement of all issues outside those covered by the July 22, 1988 Order.

REVIEWED AND AGREED TO:

/s/ Michael T. Leibig
MICHAEL T. LEIBIG
Zwerdling, Paul, Leibig,
Kahn & Thompson, P.C.
1025 Connecticut Avenue, N.W.
Washington, DC 20036

/s/ Randall M. Blow
RANDALL M. BLOW
Assistant City Attorney
City of Virginia Beach
Municipal Center
VA Beach, VA 23456

ATTACHMENT A

PLAINTIFF	EDUCATIONAL INCENTIVE PAY ADJUSTMENT
Tom Abbott	73.52
Frank La Porta	565.06
Nicholas Sitarski	47.16
John L. Bell, Jr.	55.71
David E. Boyd	0.00
Charles J. Condon	0.00
Dennis Free	312.62
James Howland	106.11
Daniel Kappers	266.22
J. G. Malesky	129.92
Joseph M. Patterson	98.58
R. F. Stange	146.72
R. T. Talbot	111.07
Grant L. Wylie	0.00
D. G. Adams	0.00
F. C. Adams, Jr.	25.86
R. J. Bach	248.53
L. M. Campbell	0.00
K. C. Emrich	101.17
R. D. Hatfield	0.00
M. J. Marshall	147.75
D. A. Painter	210.34
M. W. Stroud	0.00
R. G. Bach	148.42
D. B. Backman	453.95
W. D. Barnette	0.00
G. A. Barone	0.00
S. A. Barone	21.18
A. J. Bell	126.30
P. J. Bender	460.52
R. W. Bishop, Jr.	0.00
J. T. Blatt	0.00
J. M. Borman	0.00
R. K. Bousman, III	52.32
W. H. Boyden	0.00
J. A. Calvert, Jr.	76.70
D. L. Campbell	131.95
D. J. Campbell	293.12
M. E. Campbell	94.83
R. L. Christian, III	48.53
Lucian Colley	0.00
Michael Collins	101.76
L. D. Crisher	124.27
S. L. Crone	0.00
J. M. Curran, Sr.	0.00

PLAINTIFF	EDUCATIONAL INCENTIVE PAY ADJUSTMENT
D. L. Davis	0.00
M. A. Desantis	0.00
B. D. Dewan	0.00
Michael Dodson	85.84
T. P. Dugan	0.00
B. J. Eaton	0.00
M. L. Eller, Jr.	252.40
A. J. Elder	0.00
M. D. Faulkner	0.00
H. E. Fawley, Jr.	567.34
N. D. Ferguson, Jr.	172.41
R. G. Floyd	28.20
G. H. Fockler	69.12
Frank Genova	113.24
P. A. Gough	0.00
A. D. Hallingshead	132.82
D. D. Hammer	190.72
R. W. Hatfield	0.00
J. W. Hayden	399.81
T. D. Hayden	255.97
D. E. Hilton	0.00
J. N. Hoover	146.91
W. F. Huston, Jr.	533.79
J. Iman	219.09
D. L. Jackson	0.00
B. E. Johnson	241.26
J. V. Johnson	0.00
John Kelly	275.21
Michael Kennedy	93.23
Steven Kennedy	99.90
M. W. Kiefner	0.00
G. L. Knowles	0.00
S. D. Kurrle	114.63
G. W. Lawrence	0.00
J. V. Lindsay, III	0.00
T. J. Loftus	62.49
J. M. Macioce	0.00
Robert Manzione	0.00
R. L. Marson	0.00
R. W. Mathieson	105.51
D. W. Matson	0.00
T. M. McCarthy	0.00
J. C. McDonald	311.78
J. M. McElligott	215.76
J. A. McLuckie	355.15
R. P. Mike	69.53

PLAINTIFF	EDUCATIONAL INCENTIVE PAY ADJUSTMENT
K. A. Miller	138.12
W. T. Moran, III	0.00
M. G. Moseley	0.00
T. D. Murphy	0.00
W. J. O'Keefe	176.34
Joseph Perez	0.00
M. J. Peterson	0.00
R. A. Polizzi	0.00
R. C. Provo	0.00
R. S. Renner	182.70
W. B. Robertson	0.00
G. D. Roland	276.56
A. J. Rombs	0.00
M. P. Ronan	89.64
B. J. Ruby	86.61
R. R. Sager, Jr.	0.00
M. D. Sanderson	0.00
E. C. Seiderman	0.00
J. R. Sherwood	0.00
J. K. Slayton	0.00
A. Sokolik	0.00
J. B. Spry	0.00
T. R. Steele	0.00
W. K. Stewart	0.00
H. C. Tatum, III	152.54
J. M. Tegeler	0.00
A. A. Turner	0.00
E. Upchurch	46.69
J. E. Walters, Jr.	24.00
T. E. Warford	157.61
J. P. Werele, III	192.56
R. D. Whitehurst	0.00
D. M. Williams	531.66
E. V. Wilson	85.45
J. L. Wood	143.55
P. C. Yoakum	0.00
R. J. Zeltmann	177.29

ATTACHMENT B

VIRGINIA BEACH POLICE DEPARTMENT
COMPENSATORY TIME ACCRUED BY POLICE SERGEANTS

April 16, 1986-January 21, 1988

Bell, John L.—Date of Promotion 09-01-86

Date Earned	Amount Earned	Date Earned	Amount Earned
09-17-86	6.25	03-11-87	.50
09-18-86	2.00	03-18-87	.50
10-01-86	1.50	04-01-87	3.50
10-03-86	2.00	04-08-87	3.50
10-06-86	2.00	04-22-87	5.00
10-08-86	4.50	05-04-87	2.00
10-10-86	2.25	05-05-87	3.00
10-15-86	1.00	05-06-87	1.25
10-22-86	4.00	05-12-87	6.50
10-23-86	2.00	05-13-87	4.25
10-29-86	4.00	05-20-87	2.00
11-12-86	3.00	05-21-87	2.00
11-17-86	2.00	05-27-87	2.00
11-19-86	4.50	06-03-87	1.00
11-26-87	2.00	06-10-87	3.50
12-03-86	4.50	06-16-87	2.00
12-10-86	3.50	06-17-87	1.75
12-17-86	2.00	06-19-87	2.00
12-24-86	1.00	06-24-87	5.25
01-07-87	2.50	06-26-87	2.00
01-12-87	3.00	07-14-87	3.00
01-14-87	1.50	07-22-87	8.00
02-04-87	3.50	07-28-87	2.00
02-11-87	4.50	08-04-87	2.00
02-18-87	2.50	08-05-87	2.00
02-25-87	12.75	09-02-87	3.00
03-04-87	8.00	Total	165.75

Boyd, David E.—Date of Promotion 03-16-86

Date Earned	Amount Earned	Date Earned	Amount Earned
06-11-86	1.00	12-10-86	3.00
06-18-86	8.00	12-17-86	3.00
06-25-86	3.00	12-31-86	2.00
07-02-86	2.00	01-07-87	2.00
07-09-86	1.50	01-21-87	3.00
07-16-86	1.50	01-28-87	3.50
08-20-86	4.00	02-04-87	2.00
09-03-86	2.00	02-11-87	7.00
09-10-86	2.00	02-25-87	3.50
09-17-86	4.00	03-18-87	2.50
09-23-86	6.00	03-25-87	8.00
10-01-86	7.00	04-08-87	2.00
10-08-86	9.50	04-22-87	3.25
10-15-86	10.50	05-06-87	3.00
10-22-86	14.00	06-10-87	1.50
10-29-86	5.00	06-24-87	2.00
11-05-86	1.50	07-22-87	4.00
11-11-86	3.00	07-25-87	16.00
11-19-86	2.00	Total	174.75
12-02-86	16.00		[87.5]

Condon, Charles J.—Date of Promotion 01-01-86

Date Earned	Amount Earned	Date Earned	Amount Earned
04-17-86	2.00	12-23-86	4.50
04-23-86	1.00	01-19-87	8.00
04-28-86	2.00	01-21-87	3.75
05-06-86	2.00	02-01-87	2.50
05-12-86	2.00	02-18-87	8.75
05-20-86	3.00	02-25-87	2.00
05-22-86	2.00	03-04-87	8.00
05-23-86	4.00	03-11-87	2.00
05-28-86	2.00	03-18-87	1.00
06-03-86	2.00	03-24-87	2.00
06-11-86	.75	04-15-87	2.50
06-16-86	.50	04-27-87	2.00
06-17-86	2.00	04-29-87	2.00
06-18-86	2.00	05-14-87	3.50
06-24-86	2.75	05-27-87	2.00
07-02-86	2.00	06-11-87	2.00
07-09-86	3.00	06-16-87	2.00
07-15-86	2.00	07-02-87	2.00
07-29-86	2.00	07-08-87	.50
07-30-86	1.00	07-15-87	2.00
08-05-86	2.00	07-16-87	2.00
08-12-86	3.50	07-22-87	2.00
08-13-86	1.00	08-04-87	2.00
08-19-86	2.00	08-19-87	2.00
08-20-86	3.75	08-20-87	3.25
09-12-86	3.25	08-27-87	2.00
09-17-86	4.00	10-21-87	2.00
09-24-86	2.00	10-26-87	4.50
09-30-86	2.50	10-28-87	2.50
10-21-86	2.00	11-23-87	2.00
10-22-86	.50	11-25-87	2.00
10-28-86	2.00	11-30-87	2.00
10-29-86	2.00	12-09-87	2.00
11-05-86	1.00	12-21-87	2.00
11-19-86	4.00	12-23-87	3.00
11-24-86	2.00	01-20-88	.75
12-09-86	2.00	Total	178.50
			[89.5]

Curran, Joseph M., Sr.—Date of Promotion 10-01-74

Date Earned	Amount Earned	Date Earned	Amount Earned
08-06-86	3.50	08-05-87	2.50
11-08-86	8.00	09-30-87	5.00
01-25-87	5.50	11-25-87	4.00
04-22-87	5.00	Total	33.50

[17]

Free, Dennis E.—Date of Promotion 06-16-85

Date Earned	Amount Earned	Date Earned	Amount Earned
04-18-86	2.00	02-18-87	1.00
04-29-86	2.00	03-11-87	8.00
05-15-86	2.00	04-08-87	18.00
07-11-86	2.00	05-20-87	8.00
07-16-86	1.00	06-03-87	4.50
07-22-86	2.00	06-17-87	4.00
09-29-86	2.00	07-08-87	2.00
10-06-86	3.00	08-19-87	8.00
10-17-86	2.00	09-02-87	17.50
10-21-86	3.00	09-16-87	12.00
10-22-86	2.00	10-14-87	1.00
10-27-86	2.00	12-23-87	3.50
11-09-86	2.00	Total	116.50
11-14-86	2.00		[58.5]

Howland, James E.—Date of Promotion 09-16-80

Date Earned	Amount Earned	Date Earned	Amount Earned
05-11-86	3.00	08-13-86	2.50
05-13-86	1.00	09-10-86	10.00
05-14-86	1.00	09-17-86	2.50
05-15-86	1.00	09-16-87	5.00
05-16-86	1.00	Total	46.50
07-16-86	19.50		[23.5]

Kappers, Daniel H.—Date of Promotion 07-01-78

Date Earned	Amount Earned	Date Earned	Amount Earned
08-19-87	3.00	10-28-87	3.00
09-02-87	10.00	11-11-87	6.50
09-30-87	3.00	11-25-87	9.00
10-14-87	8.50	Total	43.00
			[21.5]

Malesky, Joseph G.—Date of Promotion 03-01-77

Date Earned	Amount Earned	Date Earned	Amount Earned
01-14-87	2.00	05-06-87	.50
02-11-87	2.50	10-28-87	5.00
03-04-87	2.00	11-25-87	1.50
03-11-87	.50	Total	22.50
04-08-87	8.50		[11.5]

Patterson, Joseph M.—Date of Promotion 09-16-80

Date Earned	Amount Earned	Date Earned	Amount Earned
07-23-86	2.50	01-28-87	2.00
08-06-86	.50	03-17-87	2.00
08-20-86	2.75	04-22-87	3.50
08-27-76	.50	05-06-87	.50
09-01-86	8.00	05-27-87	2.00
09-03-86	2.00	06-03-87	1.50
09-10-86	3.00	07-03-87	1.50
10-15-86	1.00	07-08-87	1.00
11-19-86	3.50	07-22-87	3.00
12-10-86	3.50	08-05-87	1.00
12-24-86	4.25	10-28-87	2.00
01-07-87	2.50	11-25-87	2.50
01-14-87	1.50	12-09-87	1.00
01-19-87	5.00	01-18-88	8.00
01-21-87	2.00	Total	74.00

[37]

Sitarski, Nicholas S.—Date of Promotion 12-01-78

Date Earned	Amount Earned	Date Earned	Amount Earned
04-16-86	.50	04-01-87	6.00
04-21-86	8.00	04-08-87	2.00
04-29-86	2.00	05-20-87	1.00
05-02-86	5.00	06-10-87	1.00
06-11-86	3.00	06-17-87	10.50
07-23-86	.50	06-24-87	8.50
07-26-86	3.00	07-03-87	.75
08-13-86	7.00	07-08-87	9.00
09-10-86	4.75	07-22-87	1.00
10-01-86	7.50	08-05-87	2.00
10-08-86	2.00	08-19-87	1.00
10-29-86	1.00	09-02-87	1.50
11-09-86	3.50	10-14-87	2.50
12-03-86	1.00	11-11-87	19.50
12-10-86	2.00	11-25-87	4.50
02-16-87	8.00	12-09-87	1.50
02-18-87	2.00	12-23-87	1.50
03-18-87	2.00	Total	147.00
03-25-87	10.50		[73.5]

Stange, Robert F.—Date of Promotion 08-01-79

Date Earned	Amount Earned	Date Earned	Amount Earned
05-19-86	3.00	06-10-87	2.00
06-18-86	2.00	06-24-87	2.00
07-23-86	1.50	07-22-87	1.75
03-18-87	2.25	01-20-88	.50
04-22-87	.50	Total	17.50
05-27-87	2.00		[9.0]

Talbot, Richard T.—Date of Promotion 12-01-81

Date Earned	Amount Earned	Date Earned	Amount Earned
07-09-86	1.00	05-27-87	2.00
07-23-86	2.00	06-17-87	.50
12-21-86	1.00	07-22-87	1.50
02-11-87	1.00	08-05-87	8.00
03-11-87	4.00	12-01-87	1.00
04-08-87	1.00	Total	23.00
			[11.5]

Wylie, Grant L.—Date of Promotion 01-01-86

Date Earned	Amount Earned	Date Earned	Amount Earned
05-15-86	4.00	06-10-87	.50
09-23-86	14.00	Total	20.50
11-12-86	2.00		[10.5]

APPENDIX D

29 U.S.C. §207(o)(1)-(2)

§ 207. Maximum hours.

* * *

(o) (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A) (ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in

lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

APPENDIX E

29 C.F.R. § 553.23

§ 553.23 Agreement or understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7 (o) (2) (A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must, be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation

may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

APPENDIX F

52 Fed. Reg. 2014-15 (January 16, 1987)

Section 7(o) Compensatory Time and Compensatory Time Off.

* * * *

Section 553.23 Agreement or understanding prior to performance of work.

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by ". . . a collective bargaining agreement (CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.).) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

* * * *

Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23 (b)(i), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would re-

quire a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists under State or Federal law. They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(i) should operate only where collective bargaining obligations are provided for by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggest that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative

of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA Section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

* * * *

Supreme Court, U.S.
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No. 89-729

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TOM ABBOTT, et al.,
Petitioners

v.

THE CITY OF VIRGINIA BEACH,
Respondent.

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

LESLIE L. LILLEY
CITY ATTORNEY
RANDALL M. BLOW
ASSISTANT CITY ATTORNEY
(Counsel of Record)
Municipal Center
Virginia Beach, VA 23456
(804) 427-4531

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QUESTION PRESENTED BY PETITIONERS FOR REVIEW

Petitioners argue that Respondent, City of Virginia Beach (hereinafter referred to as "the City") violated the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (hereinafter referred to as "FLSA" or "the Act"), specifically 29 U.S.C. § 207(o)(2)(A)(i), by making compensatory time available in lieu of paid overtime for overtime hours worked absent an agreement with the designated representative(s) of its employees.

The City submits that it was, and is, prohibited by the law of Virginia from entering into an agreement such as the agreement contemplated by § 207(o)(2)(A)(i) with any representative of its employees, and that, by making compensatory time available in lieu of paid overtime for overtime hours worked, at the discretion of the individual police officer, and absent an agreement with the police officers' designated representative, it was not in violation of § 207(o)(2)(A)(i).

The question presented by Petitioners for review is whether or not the provisions of § 207(o)(2)(A)(i) require a public employer to enter into an agreement with its employees' designated representative(s) notwithstanding the fact that state law prohibits public employers from entering into such agreements.

STATEMENT OF THE CASE

On February 19, 1985, this Court, in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), held that the provisions of the Fair Labor Standards Act apply to the public sector. The immediate impact of the decision was to invalidate many of the existing statutes, ordinances, policies, practices, and procedures of state and local governments concerning the wages and hours of their employees. A major impact of Garcia was that its application to the public sector invalidated the widespread use of compensatory time off in lieu of paid overtime for overtime hours worked and, therefore, presented severe financial implications for many localities

that had relied on compensatory time to offset otherwise prohibitive overtime expenditures.

In response to the public sector concerns, Congress enacted the Fair Labor Standards Amendments of 1985 (Pub.L. 99-150) (hereinafter referred to as "Amendments") which, inter alia, provide for the use of compensatory time in lieu of paid overtime in accordance with certain conditions. The Amendments were the result of numerous discussions, debates, negotiations, and agreements among many interested employer and employee groups. In commenting on the need for the Amendments, the Senate Committee on Labor and Human Resources stated that

> the financial costs of coming into compliance with the FLSA -- particularly the overtime provisions of section 7 -- are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional

financial responsibilities which in at least some instances could be substantial.

S.Rep. 159, 99th Cong., 1st Sess. 8 (1985).

The 1985 Amendments served the purpose of addressing and alleviating many of the concerns of both government and labor groups and representatives.

The amendment at issue before this Court states, in part, that

> (1) Employees of a public agency which is State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

29 U.S.C. § 207(o)(1).

Petitioners allege that the City of Virginia Beach violated § 207(o)(2)(A) which states that

> (2) A public agency may provide compensatory time under paragraph (1) only –
>
> (A) pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the

> public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or under- standing arrived at between the employer and the employee before the performance of the work ....

On April 10, 1986, Petitioner, Officer Frank LaPorta, President of the Policemen's Benevolent Association, IBPO 525, sent a letter to Mr. Thomas H. Muehlenbeck, then City Manager of the City of Virginia Beach, calling the City Manager's attention to 29 U.S.C. § 207(o)(2)(A)(i), advising him that he was the designated representative of certain police officers for purposes of the Act, and demanding that the City meet with him prior to the City's institution of "a complimentary [sic] time policy." The City declined to meet with Officer LaPorta advising him that State law prohibited the City from negotiating and entering into an agreement with any representative of public employees. The City's refusal to meet with Officer LaPorta was not a contrived decision arrived at in response to his April 10, 1986 demand for recognition, but was a decision based

on an interpretation of State law regarding union/ employee representation of public employees; a decision that was consistent with the City's historical position regarding public employee representation in light of the State prohibition. The City presently maintains, and maintained prior to the 1985 Amendments to the FLSA, that the legislature of Virginia prohibits the recognition of representatives of public employees.

Based on the 1985 Amendments and on the aforementioned legislative prohibition, the City adopted an Overtime Policy that provided for the use of compensatory time in lieu of paid overtime at the discretion of department heads or designees. However, that discretion was not exercised, and Petitioners and other police officers were permitted to voluntarily choose either compensatory time or cash for overtime hours worked. The City argues that since it was not authorized under State law to comply with § 207(o)(2)(A)(i), § 207(o)(2)(A)(ii) is controlling and, therefore, its Overtime Policy was in compliance therewith.

ARGUMENTS FOR DENYING PETITION

I. THE DECISIONS OF THE COURTS OF APPEALS FOR THE FOURTH AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT, AND REPRESENT A CLEAR AND CONCISE INTERPRETATION OF THE STATUTE IN QUESTION

II. BY FAILING TO CONSIDER THE COMMENTS OF THE DEPARTMENT OF LABOR, THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS CLEARLY ERRONEOUS

ARGUMENT I.

THE DECISIONS OF THE COURTS OF APPEALS FOR THE FOURTH AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT, AND REPRESENT A CLEAR AND CONCISE INTERPRETATION OF THE STATUTE IN QUESTION

"The statute's language makes clear that less formal or binding arrangements than collective bargaining agreements are fully sufficient for § 207(o)(2)(A)(i) purposes." Brief of Petitioners at 14. That "axiom" weaves a common thread throughout Petitioners' argument. The type of agreement that will satisfy the provisions of § 207(o)(2)(A)(i), however, is not an issue. The issue is whether or not the statute requires a public

employer to enter into an agreement with the representative of its employees prior to awarding compensatory time, irrespective of the form the agreement may take, notwithstanding the fact that state law prohibits the employer from entering into such agreements.

Petitioners have misinterpreted the decision of the Fourth Circuit in Abbott v. City of Virginia Beach, 879 F.2d 132 (4th Cir. 1989). "According to the Fourth Circuit, § 207(o)(2)(A)(i) only applies where state law permits employees of state and local governmental entities to have recognized representatives for purposes of collective bargaining." Brief of Petitioners at 13-14. (Emphasis added.) "For purposes of collective bargaining" is language added by Petitioners. The decision of the Fourth Circuit was not as narrow as Petitioners would suggest.

The Fourth Circuit stated that "the question here is whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory time in lieu of money for overtime where

state law prohibits the employer from entering into agreements with employee representatives," and concluded that "the district court properly interpreted the statute as allowing public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." 879 F.2d at 135.

The Fourth Circuit did not conclude that the representative chosen by the employees for purposes of the Act had to be a collective bargaining agent. The Fourth Circuit merely concluded that, regardless of the method by which the employees' representative is designated, if state law prohibits a public employer from "entering into agreements with employee representatives," § 207(o)(2)(A)(i) is not applicable.

The Eleventh Circuit in Dillard v. Harris, 885 F.2d 1549 (11th Cir. 1989), agreed with the Fourth Circuit's analysis.

> The legal issue turns on whether the pay is governed by a collective agreement or an individual agreement, and not on the procedures by which the agreement is made.

. . .

> If the mere designation of a representative with whom the agency could not legally make an agreement should be sufficient to control the method of compensation, it would have been simple for the statute to plainly so provide.

885 F.2d at 1556.

The Eleventh Circuit adopted the Fourth Circuit's analysis, but went on to provide "an alternative approach that reaches the same result." Id. at 1550. The Fourth Circuit concluded that § 207(o) was ambiguous and that, therefore, resort to the legislative history was appropriate.

> In construing section 207(o), the principal function of the court is to effectuate congressional intent. This is a difficult task since the statute does not define the term "representatives," legislative history is contradictory, and administrative commentary is confusing.

879 F.2d at 135.

Although the "alternative approach" taken by the Eleventh Circuit concluded that the language of § 207(o) was unambiguous, the court looked to the legislative and regulatory history behind the statute to confirm its

conclusion. And, in doing so, it reached the same conclusion as the Fourth Circuit.

Both the Fourth and Eleventh Circuits first reviewed the House and Senate Committee Reports for an expression of congressional intent. The Fourth Circuit concluded that the reports were also ambiguous, and therefore determined that resort to the regulatory history was necessary. The Eleventh Circuit concluded that "although there are unclear and conflicting statements in the legislative history, this Court will not read into the statute a requirement not included in its plain language or clearly expressed in its history." 885 F.2d at 1554.

The Fourth and Eleventh Circuits then resorted to the administrative regulations promulgated to effectuate the 1985 Amendments to the Act; the Fourth Circuit to clarify the ambiguity in the statute, the Eleventh Circuit to confirm that the regulations were not contrary to an unambiguous statute. See, 29 C.F.R. Part 553 (1988).

The pertinent provisions of the administrative regulations state:

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency .... In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

29 C.F.R. § 553.23(b)(1)

Petitioners have relied on § 553.23(b)(1) to conclude that any perceived ambiguity in the statute is cured by the regulations. But the ambiguity of § 207(o) is on two levels. First, the term "representative" is not clearly defined. And second, the statute does not clearly indicate the intent of Congress to preempt the law of those states that prohibit public employers from entering into agreements with representative(s) of public employees.

Although the Fourth and Eleventh Circuits travel different courses in the maze, both Circuits reach the same destination – the type of agreement that will satisfy the provisions of § 207(o)(2)(A)(i) is not an issue. The issue is whether or not the statute mandates a public employer to enter into an agreement with a representative

of its employees as a condition precedent to awarding compensatory time off in lieu of paid overtime for overtime hours worked. The Fourth and Eleventh Circuits concede that any type of agreement is acceptable, assuming, of course, that the employer is authorized by state law to enter into the agreement.

The state laws of Virginia and Georgia prohibit a public employer from entering into an agreement with the representative of its employees. The prevailing issue, therefore, is whether or not Congress, by enactment of § 207(o)(2)(A)(i), intended to preempt state law in that regard.

Preemption is not evident from the statute, it is not evident from the legislative history and, it is not evident from the regulations. The issue of intent to preempt is, however, addressed in the sole remaining source available to facilitate statutory interpretation -- the administrative (regulatory) history. In reaching their respective decisions, the Fourth and Eleventh Circuits were persuaded by the Discussion of Major Comments, published in concert with

the final regulations. Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed.Reg. 2012 (1987). They were particularly persuaded by the comments of the Department of Labor (DOL). The DOL, is addressing the issue of preemption stated that

> The Department recognizes a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.

Id. at 2014-15, cited in 879 F.2d at 136; 885 F.2d at 1556.

The persuasive effect of the Department's comments is evident in the following conclusion of the Fourth Circuit.

> While the Secretary [of Labor] followed the House position that an agreement must be reached between an employer and a representative of the employees where a representative has been designated -- whether recognized or not -- he also expressed intent not to preempt state law.
>
> . . .
>
> Beneath the conflicting and confusing rhetoric of the administrative and legislative history, several matters are clear. The Secretary expressly declined to preempt state laws regarding labor

> relations between public employers and employees.

879 F.2d at 136.

And, the same persuasive effect is equally evident in the following pronouncement of the Eleventh Circuit.

> Under Georgia law, the employees have no representative able to bargain over compensatory time. Accordingly, when DOL adopted 29 C.F.R. § 553.23, it did not intend for the regulation to have the impact of ignoring state law.

885 F.2d at 1556.

In the final analysis, the fundamental conclusions of the Fourth and Eleventh Circuits are logical and harmonious. Therefore, review by this Court of the clear and concise interpretation of the statute by two Circuits is, in the opinion of Respondent, unnecessary.

ARGUMENT II.

BY FAILING TO CONSIDER THE COMMENTS OF THE DEPARTMENT OF LABOR, THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS CLEARLY ERRONEOUS

The Tenth Circuit in Local 2203 v. West Adams County Fire Protection District, 877 F.2d 814 (11th Cir. 1989),

reached a decision contrary to the decisions of the Fourth and Eleventh Circuits. However, its analysis was similar to the analyses of the Fourth and Eleventh Circuits.

The Tenth Circuit concluded that § 207(o)(2)(A)(i) is applicable whenever employees have designated a representative, whether or not the representative is recognized by the employer. Its analysis turned on the type of agreement that would satisfy the provisions of the statute, concluding that any type of agreement would suffice and that, therefore, if employees have designated a representative -- whether recognized or not -- a public employer cannot award compensatory time off in lieu of paid overtime for overtime hours worked absent an agreement with the employees' representative.

As discussed hereinbefore, the Fourth and Eleventh Circuits concluded that the type of agreement contemplated by § 207(o) was not an issue, and, in fact, conceded that any type of agreement would satisfy the provisions of the statute. Therefore, in that regard, the

decisions of the Tenth, Fourth and Eleventh Circuits are not at variance.

In reaching its decision, the Tenth Circuit determined that § 207(o) is ambiguous, and resorted to the Department of Labor's regulations to resolve the ambiguity. The Fourth and Eleventh Circuits, as noted above, also resorted to the regulations -- the Fourth Circuit to resolve ambiguity, the Eleventh Circuit to confirm what it considered to be an unambiguous statute.

The final analyses in each of the Circuits essentially turned on the issue of preemption. The key distinction between the Tenth Circuit, and the Fourth and Eleventh Circuits, however, is in their approach to that issue.

In Dillard, the County Fire Protection District (hereinafter referred to as the "District"), argued that a construction of § 207(o) "requir[ing] state and local governments to engage in collective bargaining with employee representatives . . . violates the tenth amendment." 877 F.2d at 820. That argument, however, was dismissed by the Tenth Circuit.

Perhaps the Tenth Circuit's final analysis was narrowed as a result of its ability to reach a conclusion by directly addressing the District's argument without the need for further analysis. The key distinction between the decisions of the Tenth Circuit, and the decisions of the Fourth and Eleventh Circuits, therefore, was occasioned by the divergent arguments of the public employers with respect to the issue of preemption, and the manner in which those arguments were addressed.

The District argued that preemption was unconstitutional. Although the constitutionality of preemption was neither argued by the City of Virginia Beach or the State of Georgia, nor addressed by the Fourth or Eleventh Circuits, the opinions of the Fourth and Eleventh Circuits did not question the authority of Congress to preempt state and local law with respect to the issue of employee representation. The City of Virginia Beach and the State of Georgia argued that Congress did not intend for the Amendments, specifically § 207(o), to preempt state and local law, and the Fourth and Eleventh Circuits were

persuaded by that argument. The distinction between those two divergent approaches is very important.

By viewing the prevailing issue as "intent to preempt," the Fourth and Eleventh Circuits found it necessary to carry their analyses one step further than the Tenth Circuit, and considered the comments of the Department of Labor. By viewing the prevailing issue as "right to preempt," the Tenth Circuit was able to complete its analysis by going no further than a review of the Department's regulations.

The Tenth Circuit's failure to consider the comments may have resulted from oversight, or from a conscious decision to ignore them based on a determination that they provided little or no insight to its analysis. In either event, failure to consider the comments resulted in a fatally flawed analysis.

By failing to consider the comments of the Department of Labor, the agency responsible for promulgating the administrative regulations designed to assist in the interpretation of the Amendments, the Tenth Circuit's

analysis fell short of being complete. And, by falling short of being complete, its analysis, and consequently, its final decision, are clearly erroneous.

The Fourth and Eleventh Circuits completed the puzzle by adding the final piece, i.e., the Department of Labor's comments. The regulations alone do not completely clarify ambiguity in the statue. The regulations merely clarify ambiguity with respect of the issue of the type of representative or agreement contemplated by the statute. And, on that issue, there is no dispute. The Tenth, Fourth and Eleventh Circuits conclude that any designated representative, and any agreement, will satisfy the provisions of the statute. The issue begging for resolution is whether Congress intended to preempt state and local law; the issue is not whether Congress has the right to do so. And, only the comments resolve that issue.

Based on the foregoing, the City of Virginia Beach submits that although there is a conflict between the decision of the Tenth Circuit, and the decisions of the

Fourth and Eleventh Circuits, the decisions of the Fourth and Eleventh Circuits represent clear, concise and complete interpretations of § 207(o)(2)(A)(i), the decision of the Tenth Circuit is clearly erroneous, and, therefore, review by this Court is neither necessary nor required.

Respectfully Submitted,

By _____
Of Counsel

Leslie L. Lilley
City Attorney
Randall M. Blow
Assistant City Attorney
Municipal Center
Virginia Beach, VA 23456
(804) 427-4531

CERTIFICATE

I hereby certify that I mailed two true copies of the above on this 15th day of December, 1989, to counsel of record, Michael T. Liebig, Esq., 1025 Connecticut Ave., N.W., Suite 307, Washington, D.C. 20006.

_____